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Raising the Defense of Procedural Default *Sua Sponte*: Who Will Enforce the Great Writ of Liberty

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NOTE

RAISING THE DEFENSE OF PROCEDURAL DEFAULT *SUA SPONTE*: WHO WILL ENFORCE THE GREAT WRIT OF LIBERTY?

INTRODUCTION

The Supreme Court recently declared in a unanimous decision that "[a federal] court of appeals is not 'required' to raise the issue of procedural default *sua sponte*" while reviewing a state prisoner's petition for habeas corpus.[1] The same rule presumably applies to all federal courts conducting habeas review and is not limited to courts of appeals. In its brief opinion,[2] the Court re-enforced its previous holding "that in the habeas context, a procedural default . . . is not a jurisdictional matter."[3] Rather, federal courts conducting habeas corpus review of a state prisoner's conviction recognize procedural default in the state court only on the basis of comity and concerns of federalism.[4] The Supreme Court clarified that "procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'"[5]

Although clearly holding that a federal court is not *required* to raise the state's defense of procedural default, the Supreme Court explicitly refused to resolve the next logical question, whether a federal court is *permitted* to raise the defense.[6] The Court's justification for not addressing this issue was that the question was not properly be-

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[1] Trest v. Cain, 522 U.S. 87, 89 (1997).

[2] *See generally id.* The Supreme Court concluded that "[p]recedent makes clear that the answer to the question presented is 'no.'" *Id.* at 89.

[3] *Id.* at 89 (citing Lambrix v. Singletary, 520 U.S. 518, 523 (1997); Coleman v. Thompson, 501 U.S. 722, 730-31 (1991)).

[4] *See id.*

[5] *Id.* (quoting Gray v. Netherland, 518 U.S. 152, 159 (1996)).

[6] *See id.* at 90 ("We recognize some uncertainty in the lower courts as to whether, or just when, a habeas court may consider a procedural default that the State at some point has waived, or failed to raise. Nonetheless, we do not believe this is an appropriate case in which to examine that question . . . .") (citations omitted).

fore it.[7] Implicitly, however, the Court recognized that the issue has not been resolved and, without hinting at a resolution, recognized disagreement on this issue among the lower federal courts.[8]

Arguably, the Court's refusal to resolve the issue of raising procedural default *sua sponte* foreshadows future consideration. While not every legal issue is ultimately addressed by the Supreme Court,[9] the disparity of treatment by lower federal courts and the important principals of comity and federalism[10] that are involved beg for a clear resolution. Although the issue remains unresolved by the Supreme Court, *sua sponte* invocation of procedural default occurs frequently in the lower courts.[11] In fact, most circuits have ruled on this issue. Once the remaining circuits have spoken, the Supreme Court may be prepared to decide.

This Note identifies previous developments in habeas corpus jurisprudence and the policies justifying the conclusion that raising the defense of procedural default *sua sponte* is not permissible in our adversarial system. First, this Note addresses whether a procedural default in state court should operate to bar federal review regardless of how the defense is raised. If, as the Supreme Court has concluded in the past, such a default should not bar federal review, *sua sponte* invocation by the federal court is no longer an issue. Second, this Note discusses the various circuit decisions which have held in favor of raising procedural default *sua sponte*. Although the United States Courts of Appeals clearly favor raising procedural default *sua sponte*, closer examination of their decisions reveals their unanimity is illusory. Finally, this Note considers, in the context of our adversarial system, the independent interests and policies of federal courts that argue for and against *sua sponte* invocation of procedural default.

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[7] *See id.* at 90-91 (stating that the question of whether state procedural default could be raised *sua sponte* was improper because the lower court believed that it was bound by circuit precedent to raise the issue).

[8] *See id.* at 90 (comparing Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) (holding that *sua sponte* invocation of procedural default serves no important federal interest) to Hardiman v. Reynolds, 971 F.2d 500 (10th Cir. 1992) (holding that comity and scarce judicial resources may justify court raising state procedural default *sua sponte*)).

[9] *See* SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

[10] *See* Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 264 (1989). This author states that:

> The procedural default/habeas corpus issue has not lent itself easily to doctrinal analysis since its resolution, as characterized by the Supreme Court, is thought necessarily to involve a conflict between two important governmental interests: providing a federal forum for the vindication of constitutional rights and reinforcing the procedural integrity of state criminal justice systems.

Id. (citing Reed v. Ross, 468 U.S. 1, 10 (1984)).

[11] *See infra* Part III (canvassing the opinions of the United States Courts of Appeals regarding the issue of raising procedural default *sua sponte*).

One such policy is the presumption in favor of federal review when state court decisions address federal issues but do not clearly indicate reliance upon independent and adequate state grounds. Arguably this presumption in favor of federal review suggests a policy that is contrary to any notion of *sua sponte* invocation of procedural default. After weighing the arguments, this Note concludes that, in spite of the growing restrictions on federal habeas review, a rule permitting *sua sponte* invocation of procedural default would simply go too far.

I. PERSPECTIVE ON THE WRIT OF HABEAS CORPUS

Courts, Congress, and scholars alike have consistently regarded the availability of the writ of habeas corpus with the utmost reverence.[12] At least one historian has referred to the writ as "the great writ of liberty."[13] Justice Brennan in 1963 wrote that "[w]e do well to bear in mind the extraordinary prestige of the Great Writ . . . in Anglo-American jurisprudence: 'the most celebrated writ in the English law.'"[14] As Justice Brennan continued, "'there is no higher duty than to maintain it unimpaired.'"[15]

The writ of habeas corpus *ad subjiciendum*, referred to as simply the writ of habeas corpus,[16] "confers upon a prisoner the right to request that the judiciary consider the constitutionality of his deten-

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[12] As Justice Frankfurter explained:

> It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defense of personal freedom.' Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.
>
> The significance of the writ for the moral health of our kind of society has been amply attested by all the great commentators, historians and jurists, on our institutions.

Brown v. Allen, 344 U.S. 443, 512 (1953) (citation omitted) (quoting *Ex parte* Yerger, 75 U.S. 85, 95 (1868)). The Supreme Court has also stated that:

> It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.

Fay v. Noia, 372 U.S. 391, 401 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

[13] WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).

[14] *Noia*, 372 U.S. at 399-400 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129).

[15] *Id.* at 400 (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

[16] *See* Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976) ("It is now well established that the phrase 'habeas corpus' used alone refers to the common-law writ of habeas corpus *ad subjiciendum*, known as the 'Great Writ.'").

tion."[17] At the heart of the writ is the "principle . . . that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[18] One commentator describing the purpose and significance of the writ wrote:

> The writ's greatness derives from its function of inquiring into the legality of an individual's confinement. . . . Its purpose is neither to compensate the prisoner for past injustice nor to penalize the policeman or judge whose behavior gives rise to the proceeding. . . . Rather, the purpose of habeas corpus is to insure the integrity of the process resulting in imprisonment. Although it is put into operation by a particular prisoner, whose incentive is his own release, its objective is institutional reform. Habeas corpus is the structural reform mechanism of the criminal justice system, functioning to provide an avenue to vindicate substantive rights.[19]

Traditionally, the writ of habeas corpus has been characterized as an independent civil remedy rather than a stage of a criminal proceeding or an appeal.[20] Consequently, habeas corpus is commonly thought of as a *collateral* attack on unlawful imprisonment that is separate from *direct* appeal. On direct appellate review of a state court judgment, the Supreme Court "is concerned only with the *judgments* or *decrees* of state courts."[21] If an error is discovered, "the Supreme Court, on direct review, can only reverse the case and remand it to the state courts."[22] On direct review, the Supreme Court does not have the power to bring about the prisoner's release directly. However, a federal court conducting collateral habeas corpus review does possess the power to release the prisoner. In fact, a federal habeas court "has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner."[23] As a consequence of its

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[17] Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154:The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 620 (1998) (footnote omitted).

[18] *Noia*, 372 U.S. at 402.

[19] DUKER, *supra* note 13, at 3.

[20] As the Supreme Court has explained:

> "[T]he traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before.

Noia, 372 U.S. at 423-24 (footnotes omitted).

[21] *Id.* at 430 (emphasis added).

[22] William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 436 (1961).

[23] *Id.* (citing *In re* Medley, 134 U.S. 160, 173 (1890)); *see also* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1151 (1986). This author explains

"independence"[24] from direct appellate review, res judicata does not apply to habeas corpus litigation.[25]

A. *The Source of the Writ*

The writ of habeas corpus existed in English law long before the birth of the United States.[26] The writ was considered a fundamental protection against unjust imprisonment and, as such, was incorporated into our Constitution.[27] At a time when "[t]he states were conceived of as the primary protectors of individual liberty,"[28] the Suspension Clause of the Constitution was intended "to restrict *Congress* from suspending *state* habeas for *federal* prisoners."[29] Arising out of the fears that created our system of federalism, the Suspension Clause was envisioned as a necessary protection from the federal government.[30] The Judiciary Act of 1789, which granted federal court jurisdiction, also gave federal courts the authority to issue writs of habeas corpus.[31] This authority, however, extended only to federal prisoners.[32] The Supreme Court noted in *Fay v. Noia*[33] that "the first

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that "the refusal to give effect to a state procedural rule in federal habeas corpus proceedings did not make it unlawful for the state court to apply the rule in similar circumstances in the future." This author also states, however, that:

> Of course, the impact on state courts . . . cannot be measured solely by determining whether federal law forbids the states from applying a procedural rule in future cases. Even in the absence of any federal prohibition, state courts may be under substantial pressure to relax their procedural rules in future cases. A state court that takes any other course risks having a federal question it has deemed forfeited survive on direct or collateral review. It may be burdensome for the state to litigate for the first time whether the default should be excused, and if so, to consider the merits of the claim, long after the default has occurred.

Id. at 1152-53 (footnote omitted).

[24] *Noia*, 372 U.S. at 424.

[25] *See id.* at 423 ("[T]he familiar principle that *res judicata* is inapplicable in habeas proceedings, is really but an instance of the larger principle that void judgments may be collaterally impeached.") (citations omitted); DUKER, *supra* note 13, at 6 ("The principle of *res judicata* does not apply to habeas corpus litigation in the American courts.") (footnote omitted); *see also* Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("[*H*]*abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings . . . .").

[26] *See* DUKER, *supra* note 13, at Ch. 1.

[27] *See* U.S. CONST. art I, § 9, cl. 2 ("The Privilege of the Writ of Habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[28] DUKER, *supra* note 13, at 181.

[29] *Id.* at 8.

[30] *See id.* ("Underlying the purpose of the habeas clause was the fear of federal government.").

[31] *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (1845).

[32] *See* Stone v. Powell, 428 U.S. 465, 474-75 (1976) ("The authority of federal courts to issue the writ of habeas corpus . . . was included in the first grant of federal-court jurisdiction, made by the Judiciary Act of 1789, with the limitation that the writ extend only to prisoners held in custody by the United States.") (citation omitted); *see also* Ogletree, supra note 17, at 621 ("The federal courts' power to grant habeas corpus petitions initially was confined to prisoners detained under federal authority.") (footnote omitted).

[33] 372 U.S. 391 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

Judiciary Act did not extend federal habeas to prisoners in state custody."[34]

After the Civil War, the balance of state and federal power underwent a dramatic upheaval. Some commentators have argued that the states no longer remained the primary protectors of civil liberty.[35] Driven by resistance from former Confederate states opposed to new federal civil rights,[36] Congress amended the federal habeas corpus statutes in 1867 to authorize "federal trial courts to issue writs of habeas corpus on behalf of any person in custody 'in violation of the constitution' even though state authorities were responsible for the detention."[37] In order to carry through federal policy, federal habeas was allowed in state cases.[38] At this time, Congress had expanded the federal court jurisdiction with respect to habeas review to its constitutional limits.[39]

It should be noted that Congress could have enforced federal rights through other methods besides collateral habeas corpus review.[40] Congress "might well have decided entirely to circumvent all state procedure through the expansion of existing federal removal statutes . . . thereby authorizing the pretrial transfer of all state criminal cases to the federal courts whenever federal defenses or claims are

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[34] *Id.* at 409 (1963) (citation omitted); *see also* DUKER, *supra* note 13, at 8 ("Because state habeas was secured against federal interference, it was unnecessary to provide federal habeas for state prisoners.").

[35] *See* Dest, *supra* note 10, at 263 ("[A] great shift in the American federal system . . . displaced the states as the primary protectors of constitutional rights.") (footnote omitted).

[36] *See Noia*, 372 U.S. at 415 ("In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments."); Brennan, *supra* note 22, at 426 ("In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments.").

[37] VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 3-4 (1994) (citation omitted). Congress amended the federal habeas corpus statutes in Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385, 385-86 (codified at 28 U.S.C. § 2241 (1868)).

[38] *See* DUKER, *supra* note 13, at 8 ("To effectuate federal policy . . . federal habeas was gradually extended to state cases.").

[39] *See Noia*, 372 U.S. at 417 ("'This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.'") (quoting *Ex parte* McCardle, 73 U.S. 318, 325-26 (1867)); *id.* at 426 ("Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum.").

[40] As Justice Brennan has explained:

> 'We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared. And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.'

Wainwright v. Sykes, 433 U.S. 72, 106 n.8 (1977) (Brennan, J., dissenting) (quoting Greenwood v. Peacock, 384 U.S. 808, 833 (1966)).

in issue."[41] Nonetheless, Congress in its wisdom selected "liberal post-trial federal review [as] the [appropriate] redress" for federal civil rights.[42]

B. New Limitations on the Writ: The Exhaustion Doctrine

Soon after Congress significantly expanded federal habeas corpus jurisdiction, the Supreme Court introduced a new limitation on federal habeas review known as the exhaustion doctrine.[43] The Court "was determined to resist the deterioration of federalism" and prevent undue interference with the administration of state criminal proceedings.[44] As early as 1886, the Supreme Court in *Ex parte Royall*[45] declined to grant the writ of habeas corpus to a state prisoner *before* his state trial. The Court held that even though a federal court retains jurisdiction to grant the writ to such a petitioner, as a matter of discretion, the federal court should decline to do so until the state courts had an opportunity to adjudicate the federal claims.[46] The Court suggested that a federal court's power to issue the writ of habeas corpus was in part discretionary, and the decision to exercise that power should be guided by the principle of comity.[47]

The exhaustion doctrine, developed from *Ex parte Royall*, has now been codified by Congress. It requires a state prisoner petitioning for federal habeas corpus relief to exhaust all of his available state court remedies before the federal writ can be granted.[48] The purpose

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[41] *Id.* at 106 (footnote omitted).

[42] *Id.*

[43] *See* DUKER, *supra* note 13, at 8-9 ("To ensure the fine tuning of that balance [of state and federal power] and to effectuate the goal of finality, the Court created the rule of exhaustion and has employed that rule to obtain the desired mix of liberty, federal supremacy, and finality.").

[44] Brennan, *supra* note 22, at 427.

[45] 117 U.S. 241 (1886).

[46] *See id.* at 250-51; *see also* Fay v. Noia, 372 U.S. 391, 418 (1963) ("The [*Royall*] Court held that even in [cases wherein habeas was sought in advance of trial] the federal courts had the *power* to discharge a state prisoner restrained in violation of the Federal Constitution, but that ordinarily the federal court should stay its hand on habeas pending completion of the state court proceedings.") (citation omitted), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

[47] *See Royall*, 117 U.S. at 251. As the *Royall* Court explained:

> The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Id.

[48] *See* 28 U.S.C § 2254(b)(1)(A) (1999) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the

of this "exhaustion doctrine is principally . . . to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings."[49] State courts are charged equally with federal courts with the duty of enforcing federal rights.[50] Therefore, as the Supreme Court has noted, "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an *opportunity* to the state courts to correct a constitutional violation.'"[51] The principle of comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."[52]

If a petitioner fails to exhaust his state remedies by not allowing the state to adjudicate all of the petitioner's federal claims, the federal habeas court should deny the application for the writ. The court should do this "without prejudice to a renewal of the same after the accused . . . avail[s] himself of such remedies as the laws of the State afford[]."[53] From its very inception, the exhaustion rule for state remedies has been one of timing only, so that states can remedy constitutional violations before federal review is conducted.[54] Therefore, federal courts should dismiss *without prejudice* for failure to exhaust. The exhaustion doctrine was never intended to do more than delay the eventual vindication of federal rights.[55]

State . . . ."); *see also id.* § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.").

[49] Rose v. Lundy, 455 U.S. 509, 518 (1982) (citation omitted).

[50] *See* Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.") (citing Martin v. Hunter's Lessee, 14 U.S. 304, 341-44 (1816)).

[51] *Rose*, 455 U.S. at 518 (quoting Darr v. Buford, 339 U.S. 200, 204 (1950)) (emphasis added).

[52] *Id.* (quoting *Darr*, 339 U.S. at 204).

[53] Minnesota v. Brundage, 180 U.S. 499, 500-01 (1901); *see also* Fay v. Noia, 372 U.S. 391, 419 (1963) (stating that the Court has "fashioned a doctrine of abstention, whereby full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings."), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

[54] The Supreme Court has stated that:

> The reasoning of *Ex parte Royall* and its progeny suggested that after the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent.

Noia, 372 U.S. at 420.

[55] *See id.* at 418 ("[The exhaustion doctrine] plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the state court might decide.").

Since the creation of the exhaustion doctrine, the Court has continued to restrict the ease with which a state prisoner may receive federal habeas corpus relief.[56] While some of the procedural hurdles erected by the Court have the effect of denying federal habeas review, they do not limit the jurisdiction of federal courts established by Congress.[57] Each new procedural requirement, like the requirement of exhaustion, has been self-imposed, and originates in the discretion of the Court.[58]

II. PROCEDURAL DEFAULT

Given the exhaustion requirement and the federal courts' desire to allow state courts to rule on federal claims, what is the effect on subsequent federal review if a state court cannot, or will not, by its own rules, consider the prisoner's federal claims? Consider the following situation. A state prisoner, following his conviction in state court, files a petition for a federal writ of habeas corpus without filing for direct appellate review in the state courts. After initial examination of the state prisoner's petition, the federal court is informed that the state prisoner has not yet exhausted his state remedies of appeal. The federal court then dismisses the prisoner's petition without prejudice. The federal court also preserves the state prisoner's right to refile after exhausting his state court appeals. On the thirty-third day after his conviction the state prisoner, having been delayed by the aborted federal habeas corpus proceeding, files his state court appeal. State procedural rules, however, require that the prisoner file an appeal within thirty days after conviction. As a result of the prisoner's failure to appeal within the specified time limit, his various claims, both state and federal, are procedurally defaulted and will no longer

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[56] *See* FLANGO, *supra* note 37, at 6 ("The trend in recent years has been to restrict . . . federal courts as a check on state courts.") (footnote omitted); 28 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 671.02 (3d ed. 1999) ("[O]ver the last twenty years or so, the principle theme of habeas corpus jurisprudence has been the Court's creation and expansion of a series of procedural hurdles . . . all of which the petitioner must clear in order to have the federal court address the substance of the alleged constitutional violation.").

[57] *See* Stone v. Powell, 428 U.S. 465, 505-06 (1976) (Brennan, J., dissenting) (suggesting that considerations of comity and concern for the orderly administration of criminal justice are not sufficient to allow the Court to rewrite jurisdictional statutes, because to do so would be an arrogation of power committed solely to the Congress).

[58] As the Supreme Court has explained:

> Discretion is implicit in the statutory command that the judge, after granting the writ . . . 'dispose of the matter as law and justice require;' and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles.

Noia, 372 U.S. at 438 (citations omitted); *see also* Darr v. Burford, 339 U.S. 200, 204 (1950) ("Since habeas corpus is a discretionary writ, federal courts had authority to refuse relief as a matter of comity until state remedies were exhausted.").

be considered by the state court. Consequently, the state prisoner's appeal is denied on state procedural grounds.

As demonstrated in the preceding example, a state prisoner's failure to comply with state procedures, either in raising or preserving a particular claim, may result in a procedural default which bars future consideration of the claim on its merits.[59] The majority of "[s]uch defaults . . . involve traditional 'make it or waive it' defenses, such as contemporaneous objection rules, in which appeals are forfeited if not made in a timely fashion."[60] The purpose of enforcing procedural defaults through forfeiture of the underlying claim is the promotion of orderly administration of state proceedings.[61] Although other penalties might be envisioned, the severe nature of forfeiture is intended to deter non-compliance with state procedural rules.[62]

If a state prisoner forfeits his federal claims in state court by violating state procedural rules, an additional question arises as to whether a federal court may nonetheless rule on the procedurally defaulted claims. In the context of federal habeas corpus review, as opposed to direct appellate review, the doctrine of exhaustion does not

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[59] Justice Brennan has observed:

> State courts may deny a state prisoner relief from an unconstitutional conviction by refusing to pass upon the prisoner's federal claims because of some failure to comply with state procedures – for example, to file a timely appeal – or because of some conduct of the prisoner deemed by the state courts to justify the denial of a hearing – for example, the prisoner's escape from custody pending decision of his appeal in the state courts.

Brennan, *supra* note 22, at 425; *see also* Ogletree, *supra* note 17, at 624 ("Procedural default bars both frivolous and non-frivolous claims that were not raised or preserved properly in prior judicial proceedings, thereby eliminating any prospect of adjudicating the claims on their merits in a subsequent . . . proceeding.").

[60] Dest, *supra* note 10, at 264.

[61] *See* Ogletree, *supra* note 17, at 624 ("Procedural default rules are incorporated into state and federal judicial systems to promote the efficient and orderly resolution of issues in appellate and habeas corpus proceedings.") (footnote omitted). As another commentator has stated:

> [Procedural rules] serve critical purposes: the provision of adequate notice to adversaries (and the court) of the matters that are at issue; the allocation of decisions to the appropriate body; the promotion of focused consideration of particular questions at different times, when the pertinent evidence and argumentation can be mustered; and the avoidance of wasteful proceedings by requiring prompt consideration of issues upon whose resolution further matters (or the continuation of the proceeding at all) depend. It is hard to imagine an effective procedural system lacking such rules of the road.

Meltzer, *supra* note 23, at 1134-35.

[62] One author has stated that:

> Forfeiture provisions supply a necessary bite to . . . structural rules. A requirement that a particular issue be raised in a particular fashion or at a particular time would hardly be effective if failures to comply were never punished – especially if, as may often be true, one adversary may find some strategic advantage in disregarding the rule. Monetary fines could surely be imposed to induce compliance, but there is at first glance a kind of poetic justice in forfeiting the very claim that was improperly asserted.

Id. at 1135.

operate as a bar. Technically, the exhaustion requirement has been satisfied since no state remedies remain available.[63] Therefore, if federal review is barred, it must be barred on some other ground.

A. *The Effect of State Procedural Default on Direct Federal Review: The Independent and Adequate State Ground Doctrine*

The appellate jurisdiction of the Supreme Court over state cases is restricted by statute and the principle of federalism to those state decisions that turn on federal law.[64] For cases that turn on state law, the state court's judgment must control.[65] As a consequence of its limited jurisdiction, the Supreme Court has developed the doctrine of "independent and adequate state grounds."[66] This doctrine was originally expressed[67] in *Murdock v. City of Memphis*.[68] Later, in *Fox Film Corporation v. Miller*,[69] the Supreme Court held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] . . . jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."[70] As originally conceived, the doctrine "only applied to state substantive law, not to the

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[63] *See* Coleman v. Thompson, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.") (citations omitted).

[64] Justice Brennan has stated that:

> [The] principle of federalism is imbedded in the statutes governing direct review by the Supreme Court of state court decisions. From the Judiciary Act of 1789 down to the present statutes, the Supreme Court's appellate jurisdiction over state cases has been restricted to state decisions which necessarily turn on questions arising under the Constitution or laws or treaties of the United States.

Brennan, *supra* note 22, at 434

[65] *See Coleman*, 501 U.S. at 729 ("[T]his Court has no power to review a state law determination . . . ."); Brennan, *supra* note 22, at 435 ("[T]here seems no conceivable justification, in the context of our federalism, for authorizing the Supreme Court . . . to have the final say on pure state law questions . . . .").

[66] *See* Brennan, *supra* note 22, at 434 ("[The Supreme Court's] jurisdictional confinement was explicit in . . . the first Judiciary Act. Although a later amendment of the statute omitted the express limitation, the Supreme Court nevertheless refused to overstep the jurisdictional boundaries which had previously been delimited for it . . . .") (footnotes omitted); *id.* at 436 ("[T]he adequate state ground rule is an interpretation of a statute delimiting [Supreme Court] jurisdiction on direct review . . . .").

[67] *See* Dest, *supra* note 10, at 267 ("The independent and adequate state ground doctrine originated in the landmark case of *Murdock v. Memphis*.") (footnote omitted).

[68] 87 U.S. 590 (1874).

[69] 296 U.S. 207 (1935).

[70] *Id.* at 210. The Supreme Court has also stated:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.

Coleman, 501 U.S. at 729 (citations omitted); *see also* Brennan, *supra* note 22, at 434 ("[S]tate-court dispositions which rest, even though alternatively, upon adequate and independent state-law grounds are impervious to any federal corrective process . . . .").

enforcement of state procedural rules."[71] Now, however, "[t]his rule applies whether the state law ground is substantive or procedural."[72] Therefore, if a state court's judgment denying the appeal of a state prisoner is based on an independent and adequate state ground, namely, a procedural default for failure to comply with state procedural law, the procedural default operates as a bar to direct review by the Supreme Court.

The rule of "independent and adequate state grounds" is based on the Court's ban on rendering advisory opinions.[73] This ban originated during the presidency of George Washington when the Court refused to answer questions from the Secretary of State Thomas Jefferson regarding legal issues arising out of the war between England and France.[74] The Supreme Court noted "that it was constitutionally forbidden to issue 'advisory opinions'—opinions on the constitutionality of legislative or executive actions that did not grow out of a case or controversy."[75] In a state court decision resting alternatively on federal grounds and an independent and adequate state ground, the ban on rendering advisory opinions prevents the Supreme Court from ruling on the federal questions which if alone would be properly within its jurisdiction. Because the Supreme Court would be limited to reversing and remanding the state court's ruling on the federal ground, the power of the state court to reinstate its judgment based entirely on the independent adequate state ground would render the Supreme Court's ruling on federal law an advisory opinion.[76] Conse-

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[71] Dest, *supra* note 10, at 267.

[72] *Coleman*, 501 U.S. at 729 (citations omitted).

[73] *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Brennan, *supra* note 22, at 434.

[74] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 90 (3d ed. 1996).

[75] *Id.*

[76] *See* Lambrix v. Singletary, 520 U.S. 518, 524 (1997) ("We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.") (citations omitted); *Coleman*, 501 U.S. at 729 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.") (citation omitted); *Herb*, 324 U.S. at 125-26 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Justice Brennan has also explained that:

> [C]onsider for a moment just what were the drastic consequences which the Court apprehended might follow if it should review directly a case from the state courts whenever a 'federal question' purportedly was decided, even though side by side with an independent state ground sufficient to support the disposition. . . . To sustain Supreme Court jurisdiction under such circumstances would be to impale the Court on the prongs of an excruciating dilemma. Is the Court to take the case simply to pass on the federal question? It seems obvious that such a course could lead to nothing more than reversal on the federal ground followed by remand to the state court, which would then simply posit its decision squarely upon the state ground, and reinstate its judgment. This course involves the Court in the rendition of advi-

quently, when a state court judgment rests on an independent and adequate state law ground such as a procedural default, direct review by the Supreme Court is barred for lack of jurisdiction.

B. The Effect of State Procedural Default on Federal Habeas Corpus Review

The effect of a state procedural default on federal habeas corpus review is not as firmly established as the effect of such a default on direct federal review.[77] While the underlying habeas corpus statutes have remained relatively uniform,[78] the Supreme Court has engaged in a long debate of when, if ever, a state procedural default should operate to bar federal habeas review.[79] According to one commentator, the Supreme Court's treatment of procedural defaults "hardly conform[s] to the tradition of giving stare decisis great weight in matters of statutory interpretation,"[80] and "this process of 'statutory interpretation' looks very much like judicial lawmaking."[81] The Court has even *relied* on the "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[82]

Beyond its use as interesting background material, the significance of this issue may not be immediately obvious within the context of this Note. Although removed from the narrower question of whether a federal court may raise the issue of procedural default *sua sponte*, the Court's resolution of state procedural defaults, regardless of how raised, is highly informative if not dispositive for the resolution of the narrower issue. If the Court holds, as it has in the past, that a state procedural default should *rarely* operate to bar federal habeas corpus review, then the narrower issue of raising procedural default

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> sory opinions – contrary to the clear purposes, if not the word, of the judicial article of the Constitution.

Brennan, *supra* note 22, at 434 (footnote omitted).

[77] *See* Dest, *supra* note 10, at 264 ("[T]he Supreme Court has struggled to articulate a substantive and consistent solution to the problem presented by the federal review of habeas corpus claims that are defaulted in state court.").

[78] *See* Meltzer, *supra* note 23, at 1166 ("The shifts in Supreme Court treatment of procedural defaults have taken place notwithstanding continuity in the underlying statutory scheme.").

[79] *See* Fay v. Noia, 372 U.S. 391, 399 (1963) ("The question has been much mooted under what circumstances, if any, the failure of a state prisoner to comply with a state procedural requirement, as a result of which the state courts decline to pass on the merits of his federal defense, bars subsequent resort to the federal courts for relief on habeas corpus.") (footnote omitted), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977); *id.* at 411-12 ("We do not suggest that this Court has always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling.") (citations omitted).

[80] Meltzer, *supra* note 23, at 1166 (footnote omitted).

[81] *Id.* (footnote omitted).

[82] *Wainwright*, 433 U.S. at 81.

sua sponte is moot. Federal courts conducting habeas review would have no incentive to search the state record for a procedural default if the existence of a procedural default, no matter how it was discovered, would not operate as a bar to federal review. While the debate over the proper treatment of state procedural defaults is simply too extensive for this Note, a summary of the arguments reveals that the Court's current scheme of barring habeas review of procedurally defaulted claims is neither inevitable nor necessarily correct.

One of the many arguments against federal recognition of state procedural defaults is the contention that broad federal review is a necessary incentive to ensure that state courts vindicate federal rights.[83] Because states may be hostile to particular federal rights,[84] and because of the institutional constraints on direct Supreme Court review,[85] the threat of federal habeas corpus review serves as a primary source of protection for federal right-holders. Furthermore, because of the additional risks faced by the "guilty" when their federal claims are reviewed by popularly elected state courts,[86] federal habeas

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[83] *See* Stone v. Powell, 428 U.S. 465, 520 (1976) (Brennan, J., dissenting) ("'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'") (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)); *id.* at 521 ("The availability of collateral review assures 'that the lower federal and state courts toe the constitutional line.'") (quoting *Desist*, 394 U.S. at 264 (Harlan, J., dissenting)); *id.* ("The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark.") (quoting Mackey v. United States, 401 U.S. 667, 685-87 (1971)); *see also* Brennan, *supra* note 22, at 442 ("The state judiciaries, responsible equally with the federal courts to secure . . . [federal] rights, should be encouraged to vindicate them. A self-fashioned abdication by the federal courts of their habeas corpus jurisdiction in cases where state prisoners are denied state relief because of procedural defaults would not provide that encouragement.").

[84] *See* Meltzer, *supra* note 23, at 1136 ("In some cases, states may be hostile to particular federal rights or rightholders. Moreover, deciding whether to forgive a default depends in large part upon the importance assigned to the right in question; even absent any hostility to federal rights, state courts or legislators may make value judgments that give federal rights inadequate scope.") (footnote omitted).

[85] *See Powell*, 428 U.S. at 526 (Brennan, J., dissenting) ("The Court does not, because it cannot, dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law, and does not controvert the fact that federal habeas jurisdiction is partially designed to ameliorate that inadequacy.") (footnote omitted).

[86] *See id.* at 525 (Brennan, J., dissenting). As Justice Brennan explained:

> Enforcement of *federal* constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of *federal* habeas review, lest judges trying the 'morally unworthy' be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation of the Constitution or laws . . . of the United States."

Id. (citation omitted).

corpus review must be broad and free of the constraints of state procedural default.

Perhaps the most important consideration in deciding whether to enforce state procedural defaults during federal habeas corpus review involves the proper role of the 'independent and adequate state ground' doctrine. Despite the fact that the doctrine originated from the Supreme Court's interpretation of statutes limiting its direct appellate jurisdiction,[87] some have argued that the doctrine should be extended to collateral habeas corpus review in order to minimize conflicts between the state and federal judiciaries.[88] At the very least, some have suggested that "we ought certainly to scrutinize carefully the appropriateness of the adequate state ground rule as some would now have it apply to federal habeas corpus," given that the doctrine is supported by such significant policy justifications in the context of direct review.[89]

With respect to direct review, the "independent and adequate state ground" doctrine prevents the Supreme Court from rendering an advisory opinion.[90] The Supreme Court, when conducting direct appellate review of a state court judgment, has no other power than to reverse the state's ruling on federal law and remand the case back to the state court.[91] Because the state, on the basis of the prisoner's procedural default, may render the same judgment regardless of the reversal on federal law, the Supreme Court's judgment would have no effect and would be advisory.[92] With respect to collateral habeas corpus review, however, there is no danger of rendering an advisory opinion. A federal court conducting habeas corpus review has the power to order the state prisoner's release directly. This is the precise power that the Supreme Court lacks on direct review, which creates the risk of rendering an advisory opinion.[93] Consequently, the same

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[87] *See* Brennan, *supra* note 22, at 435 ("It is of course immediately obvious that the adequate state ground rule is nothing more than the Supreme Court's interpretation of a statute having to do with Supreme Court review, and not with habeas corpus. Indeed, when Congress amended the habeas corpus statute . . . the restrictions upon the Supreme Court's jurisdiction were not incorporated.").

[88] *See id.* ("[P]erhaps . . . the problems of federal-state relationships which have been inherent in the federal habeas corpus jurisdiction since 1867 . . . suggest[ ] the extrapolation from the field of direct Supreme Court review of a doctrine meant to minimize uncalled-for intrusions by the federal judiciary into what ought to be exclusively state domains.").

[89] *Id.* (footnote omitted).

[90] *See supra* Part II.A (discussing the "independent and adequate state ground" doctrine).

[91] *See supra* note 22 and accompanying text.

[92] *See supra* note 76 and accompanying text.

[93] Justice Brennan has stated that:

> [T]he fact that the adequate state ground rule is an interpretation of a statute delimiting jurisdiction on direct review will not necessarily disqualify it from service in connection with federal habeas corpus, if the factors which make it seem so necessary a limitation on the Supreme Court's appellate jurisdiction are applicable with anything like the same force to federal habeas corpus. Is there, then, any risk of a federal district court's rendering an advisory opinion on a question of federal law if

factor which makes the "independent and adequate state ground" doctrine seem necessary on direct appeal does not apply to collateral habeas corpus review.

On the basis of these arguments, among others,[94] the Supreme Court in *Fay v. Noia*[95] rejected the notion that the 'independent and adequate state ground' doctrine operated to bar habeas corpus review of procedurally defaulted claims.[96] Using the common balancing of interests analysis,[97] the Court in *Noia* clearly chose in favor of securing a federal forum for the vindication of constitutional rights rather than securing the orderly administration of state criminal justice sys-

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it orders a petitioner's release without purporting to decide any state-law question? You will, I am certain, agree that an order having such consequences could never be said to reflect an advisory opinion. . . . [T]he Supreme Court, on direct review, can only reverse the case and remand it to the state courts. It cannot secure the prisoner's release directly, and it is from this deficiency in its power that the problem arises of advisory opinion. . . . Since the federal habeas corpus court does not function under any such limitation on its power, it is confronted by no such dilemma.

Brennan, *supra* note 22, at 436

[94] The *Noia* Court phrased the arguments as such:

[T]he measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. Congress seems to have had no thought, thus, that a state prisoner should abide state court determination of his constitutional defense – the necessary predicate of direct review by this Court – before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged.

Fay v. Noia, 372 U.S. 391, 416 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977). The Court further stated that:

A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution.

Id. at 433-34 (citation omitted).

[95] 372 U.S. 391 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

[96] The *Noia* Court explained:

[W]e reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

Id. at 434. The Court further held "that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings." *Id.* at 438.

[97] *See supra* note 10.

tems.[98] The Court held that the exhaustion requirement applied only to federal claims that could still be heard in a state court.[99] If a particular claim could no longer be heard in state court because it was procedurally defaulted, the federal court retained jurisdiction but possessed *limited discretion* to refuse to hear the claim.[100] The narrow circumstance within which a federal court could exercise its discretion involved situations where the petitioner had deliberately bypassed his state remedies before resorting to federal review.[101]

Since *Fay v. Noia*, the Court has issued a series of decisions eroding and eventually overruling the holding of that case.[102] In a

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[98] As the Court stated, "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Noia*, 372 U.S. at 424. The Court further stated that although "orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure . . . that state interest 'competes . . . against . . . [the] ideal of fair procedure.'" *Id.* at 431 (quoting Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 5 (1956)). The Court further explained that:

> It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.

Id. at 440-41 (footnote omitted). The Court also stated that "we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy." *Id.* at 426-27.

[99] *See id.* at 435 ("We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court.") (footnote omitted).

[100] *See id.* at 438 ("Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances.").

[101] *See id.* ("We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.").

[102] In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court held that:

> In *all* cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. . . . We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Id. at 750 (emphasis added) (citation omitted); *see also* Wainwright v. Sykes, 433 U.S. 72 (1977) (extending the "cause and prejudice" standard for excusing state procedural defaults to state contemporaneous objection rules); Francis v. Henderson, 425 U.S. 536 (1976) (extending to state prisoners the rule that federal prisoners petitioning for a writ of habeas corpus must show "cause and prejudice" for failing to challenge the composition of a grand jury before trial);

dramatic shift, the Court, relying on the principles of federalism and comity,[103] gave in to pressure from the states[104] and "retreated from . . . liberal application of the writ."[105] While "Fay . . . created a presumption in favor of federal habeas review of claims procedurally defaulted in state court,"[106] the Court now applies the "independent and adequate state ground" doctrine to bar federal review in almost all cases of procedural default.[107] In place of the "deliberate bypass" standard, which set out a narrow exception under which a federal court would decline habeas review, the Court has instituted a "more onerous standard"[108] of "cause and prejudice,"[109] which establishes

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Dest, *supra* note 10, at 270 ("As soon as the Supreme court adopted the *Fay* rule, it began to back away from it."); Meltzer, *supra* note 23, at 1146 ("[S]oon after *Noia*, the Supreme Court began to reduce the gap between direct and collateral review.").

[103] *See Coleman*, 501 U.S. at 730 ("In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism."); *Sykes*, 433 U.S. at 88 ("The contemporaneous-objection rule . . . deserves greater respect than Fay gives it . . . for the fact that it is employed by a coordinate jurisdiction within the federal system . . . ."); *Francis*, 425 U.S. at 542 ("'Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.'") (quoting Kaufman v. United States, 394 U.S. 217, 228 (1969)). As another commentator has observed:

> The most startling difference between the *Fay* and *Wainwright* analyses lies in the divergent ways the Supreme Court characterized and weighed the different sovereign interests involved in the case of a state procedurally defaulted habeas corpus claim. In *Fay*, the importance of having a federal forum for the enforcement of federal rights trumped the reinforcement of state procedural rules. . . . In *Wainwright*, however, the federal policy of ensuring the enforcement of federal rights in a federal forum was outweighed by comity concerns attending collateral review by a coordinate jurisdiction and by state interests, such as finality and reliability, thought to be fostered by the rigid enforcement of state procedural rules.

Dest, *supra* note 10, at 272-73

[104] See MOORE ET AL., *supra* note 56, at § 671 App. 200[3] ("The relatively broad relief which became available to habeas petitioners during the 1950's and 1960's almost instantly became the subject of pressure from the states, which greatly resented the interference with their administration of justice and the fact that a conviction which had been affirmed by the highest court of a state could be reversed by a single federal judge. Considerations of federalism, comity, and finality soon led to a restriction in the use of the writ to seek relief."). *But see* Brennan, *supra* note 22, at 427 ("[I]t might 'appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus. . . . ' But . . . after examining the [habeas] statute, . . . 'there seems to be no escape from the law.'" (quoting *Ex parte* Bridges, 4 Fed. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1862)).

[105] Ogletree, *supra* note 17, at 625 (footnote omitted).

[106] *Coleman*, 501 U.S. at 745.

[107] *See id.* at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law . . . .").

[108] Ogletree, *supra* note 17, at 625.

[109] In *Murray v. Carrier*, 477 U.S. 478 (1986), the Supreme Court stated:

> [T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not rea-

the narrow exception under which a federal court will ignore the procedural default and proceed with federal review.

Although some commentators have referred to *Fay v. Noia* as a "notorious . . . decision,"[110] the "demise" of that opinion was not accepted without dissent.[111] Even the staunchest critics of *Noia* must

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sonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard.

Id. at 488 (citations and internal quotations omitted). *Cf. id.* at 496 ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); *see also* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3b-c (2d ed. 1994) (discussing tests for cause and prejudice, respectively).

[110] Robert C. Post, *Justice Brennan and Federalism, in* FEDERALISM: STUDIES IN HISTORY, LAW AND POLICY 37, 38 (Harry N. Scheiber ed., 1988).

[111] In *Coleman v. Thompson*, 501 U.S. 722 (1991), Justice Blackmun stated:

> Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . . One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.

Id. at 758 (Blackmun, J., dissenting). He further stated that "the form of federalism embraced by today's majority bears little resemblance to that adopted by the Framers of the Constitution and ratified by the original States. The majority proceeds as if the sovereign interests of the States and the Federal Government were coequal." *Id.* at 759. Justice Brennan has taken a similar stance:

> If the Court believes that *Fay* is no longer good law, and if the Court has the 'institutional duty' to develop and explicate the law in a reasoned and consistent manner, then it has the duty to face squarely our prior cases interpreting the federal habeas statutes and honestly state the reasons, if any, for its altered perceptions of federal habeas jurisdiction. I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled *Fay* this Term . . . . I adhere to the holding of *Fay* and our other precedents establishing that, absent a deliberate bypass of state procedures, a procedural default cannot justify the withholding of habeas relief from a state prisoner who was convicted in derogation of his constitutional rights; if the Court no longer shares that view, it is evident that it has an 'institutional duty' to say so forthrightly and to explain why some other standard is to be applied . . . .

Francis v. Henderson, 425 U.S. 536, 547 (1976) (Brennan, J., dissenting) (citation omitted). Justice Brennan further explained that:

> I fail to comprehend how 'considerations of comity and federalism' – vague concepts that are given no content by the Court – grant this Court the power to circumscribe the scope of congressionally intended relief for *state* prisoners . . . . Such considerations, in our federal system in which the federal courts are the ultimate arbiters of federal constitutional rights, at most justify the postponement, not the abnegation, of federal jurisdiction. . . . The increasingly talismanic use of the phrase 'comity and federalism' itself essentially devoid of content . . . has the look of an excuse being fashioned by the Court for stripping federal courts of the jurisdiction properly conferred by Congress.

Id. at 548-51. Another commentator, suggesting that the decision in *Wainwright* cannot be justified on the basis of existing abstention principles, has stated:

> [T]he finality of state court litigation has been specifically undercut by the availability of collateral federal review under the habeas corpus statute . . . . Hence, a state does not have a legitimate governmental interest in the complete finality of its decisions over habeas corpus claims. Since the state has no 'countervailing' interest that

agree that given the Court's checkered past with the habeas statutes, there is no guarantee that future Courts will not return to its previous holding.[112] Furthermore, "Congress, as the primary expositor of federal-court jurisdiction, remains free to undo the potential restrictiveness"[113] of *Noia*'s successors.

In truth, a significant portion of the *Noia* decision, at least for the purposes of this Note, survives. *Fay v. Noia's* broad holding that the "independent and adequate state ground" rule does not apply to collateral habeas corpus review has been overruled. Nonetheless, the overruling cases acknowledge that the doctrine of "independent and adequate state grounds" is not *jurisdictional* with respect to habeas review.[114] On the issue of raising procedural default *sua sponte*, this concession to the rule of *Fay v. Noia* is of great significance.

The basic rule of the Supreme Court (and courts in general) is that issues not raised, or not properly raised, by the parties will not be raised for the first time by the Court.[115] The primary exception to this rule involves issues that affect the subject-matter jurisdiction of the Court.[116] For issues such as these, the very power of the Court to re-

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would be fostered by the declination of federal jurisdiction in cases of state procedural default, the federal courts should not abstain from hearing such claims.

Dest, *supra* note 10, at 293-94 (footnote omitted); *see also* Meltzer, *supra* note 23, at 1166 n.178 ("Even those critical of *Noia* have suggested that it is odd to foreclose a defendant from raising an issue collaterally if, had he complied with appropriate state procedures, the result would not have been a conclusive state court resolution of the issue, but rather 'a prelude to dispositive federal adjudication.'") (quoting P. BATOR et al., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1486 (2d ed. 1973)).

[112] *See supra* notes 79-82 and accompanying text.

[113] Wainwright v. Sykes, 433 U.S. 72, 101 n.2 (1977) (Brennan, J., dissenting).

[114] The Supreme Court has stated that:

> The "independent and adequate state ground" doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus . . . since the federal court is not formally reviewing a judgment. . . . Application of the "independent and adequate state ground" doctrine to federal habeas review is based upon equitable considerations of federalism and comity.

Lambrix v. Singletary, 520 U.S. 518, 523 (1997). The Court has further declared:

> In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional . . . . The basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court. . . . In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism.

Coleman, 501 U.S. at 729-30. *But see* LIEBMAN & HERTZ, *supra* note 109, at 812-13 (suggesting that the "independent and adequate state ground" doctrine should be jurisdictional with respect to both direct and habeas review).

[115] *See* Hardiman v. Reynolds, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense *sua sponte*."); Ernest H. Schopler, Annotation, *What Issues Will The Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties*, 42 L. Ed. 2d 946, 949 (1976) (illustrating the general rule of the Supreme Court to not raise issues not already raised by the parties).

[116] *See* Schopler, *supra* note 115, at 950 ("The most important issues considered by the court as an exception to the ordinary rule concern questions of federal subject-matter jurisdic-

solve the parties' dispute is called into question and the Court, if it is aware of the issue, must address it whether or not it is raised by the parties.[117] As a consequence of the now generally accepted position "that in the habeas context, procedural default . . . is not a jurisdictional matter,"[118] the Court in *Trest v. Cain*[119] correctly held that "[a] court . . . is not 'required' to raise the issue of procedural default *sua sponte*."[120] Therefore, the last surviving vestiges of *Noia* serve, at least, to keep open the question of raising procedural default *sua sponte*.

But how does the Court's treatment of state procedural defaults, no matter how they are raised, affect the question of whether a federal court *may* raise the issue of procedural default *sua sponte*? Under the Court's "deliberate bypass" standard, the opportunities for a federal court to raise the defense of procedural default *sua sponte* would be very rare. In the majority of cases, the state procedural default would result from inadvertence or neglect on the part of the defendant or his attorney[121] and the default no matter how it was raised would not operate as a forfeiture of the defendant's federal claims. Even on the rare occasion where the defendant had deliberately bypassed his state remedies, the same balancing of interests that created the "deliberate bypass" standard would counsel against raising the state defense of procedural default *sua sponte*. In light of the *Noia* Court's deep admiration and respect for the role of the writ of habeas corpus in our federal scheme, it would be an affront to the history and purpose of the writ for the Court to defeat by its own efforts a state petitioner's potentially meritorious federal claims.

Conversely, the "demise" of *Noia*, while it does call into question the extent to which the Court's esteem for the writ has fallen, does not particularly address the issue of whether a state procedural default can be raised *sua sponte*. Although federal courts will now decline habeas corpus review on the basis of concerns for comity and federalism, the further question that remains to be answered is whether comity and federalism are independent federal interests

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tion, whether it is the Supreme Court's own jurisdiction or that of the courts below.") (citation omitted).

[117] *See id.* § 4 (citations omitted).

[118] Trest v. Cain, 522 U.S. 87, 89 (1997).

[119] 522 U.S. 87 (1997).

[120] *Id.*

[121] *See* Wainwright v. Sykes, 433 U.S. 72, 104 (1977) (Brennan, J., dissenting) ("[A]ny realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.") (citation omitted); Fay v. Noia, 372 U.S. 391, 433 (1963) ("A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding.") (citation omitted).

which federal courts should raise on their own. For those who are persuaded by the holding of *Noia* and subscribe to the "greatness" of the writ of habeas corpus, the issue of raising procedural default *sua sponte* is all but foreclosed. For those who agree that *Noia* was a "notorious . . . decision,"[122] the question of raising procedural default *sua sponte* remains open.

III. RAISING PROCEDURAL DEFAULT *SUA SPONTE*: OPINIONS OF THE UNITED STATES COURTS OF APPEAL

When a state prisoner petitions for a federal writ of habeas corpus, it is generally in the best interest of the State, seeking to bar release, to raise any defenses that are available to it. Because the issue of procedural default, at least with respect to habeas corpus, is not a jurisdictional matter,[123] the State must rely on procedural default as an affirmative defense.[124] Occasionally, a State will expressly waive a defense such as procedural default or will waive it by inadvertently failing to raise it.[125] In these situations, a federal court may be tempted to raise the defense on its own. Before doing so, however, the federal court must determine whether it is permitted under the circumstances to raise procedural default *sua sponte*.

Many circuits, though not all, have ruled expressly on the issue of raising procedural default *sua sponte*. Among these circuits, all hold that federal courts possess discretion[126] to invoke procedural default *sua sponte*. However, there is no uniformity in reasoning among the circuits and, more importantly, there is significant disagreement regarding when the court's discretion is properly exercised.

Some circuits, as justification for raising procedural default *sua sponte*, rely on the fact that federal courts may raise the requirement

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[122] Post, *supra* note 110, at 38.

[123] *See supra* note 3 and accompanying text.

[124] *See Trest*, 522 U.S. at 89 ("[P]rocedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'") (quoting Gray v. Netherland, 518 U.S. 152, 165-66 (1996)).

[125] *See* Esslinger v. Davis, 44 F.3d 1515, 1524 n.32 (11th Cir. 1995) ("The state can waive a procedural bar to relief by explicitly waiving, or by merely failing to assert, the bar in its answer to the habeas petition.").

[126] The introduction of the notion of discretion turns what was one question into two. First of all, is a federal court, conducting habeas corpus review of a state prisoner's conviction, permitted to raise the state's defense of procedural default *sua sponte*? According to the majority of Circuits, the answer is yes – federal habeas courts possess discretion to invoke procedural default *sua sponte*. *See infra* notes 127-34 and accompanying text. Secondly, when, if ever, should a federal habeas court exercise its discretion? The separation of these issues does not alter the nature of the arguments against raising procedural default *sua sponte*; it only changes the focus of those arguments. One might easily concede that federal courts possess discretion to raise procedural default *sua sponte* and yet as a matter of policy conclude that the courts should never exercise that discretion.

of *exhaustion sua sponte*.[127] In spite of arguments to the contrary,[128] these circuits hold that "there is no substantial difference between nonexhaustion and procedural default."[129] Some circuits rely additionally, or in the alternative, on Rule 4 of the Rules Governing Section 2254 Cases in the United State District Courts.[130] According to these circuits, "[t]his rule empowers the court to dismiss meritless petitions on its own without requiring any action by the government."[131] Still other circuits note as significant an exception to the general prohibition against raising defenses *sua sponte* "where a 'doctrine implicates [nonjurisdictional] values that may transcend the concerns of the parties to an action.'"[132] According to these circuits, "the state procedural default doctrine substantially implicates important values that transcend the concerns of the parties to an action. The doctrine is grounded upon concerns of comity between sovereigns and often upon considerations of judicial efficiency."[133] Consequently, "it is not exclusively within the parties' control to decide whether such a defense should be raised or waived."[134]

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[127] *See, e.g.*, Magouirk v. Phillips, 144 F.3d 348, 357 (5th Cir. 1998) ("Some . . . circuits have expressly relied upon the similarity between exhaustion and procedural default to hold that a federal court may exercise its discretion to raise procedural default *sua sponte*.") (citing Washington v. James, 996 F.2d 1442, 1448 (2d Cir. 1993); Hardiman v. Reynolds, 971 F.2d 500, 504 (10th Cir. 1992); Hull v. Freeman, 932 F.2d 159, 164 (3d Cir. 1991)).

[128] *See infra* Part V (refuting the argument that the ability of the federal courts to raise exhaustion requirements *sua sponte* furnishes a justification for allowing the courts to raise procedural default *sua sponte*).

[129] *Magouirk*, 144 F.3d at 358.

[130] *See* Rules Governing § 2254 Cases in United States District Courts, Rule 4. The rule states that:

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

28 U.S.C.A. foll. § 2254 (1994); *see also* Boyd v. Thompson, 147 F.3d 1124, 1127-28 (9th Cir. 1998) (suggesting that Rule 4 demonstrates Congress' intent that district courts take a more active role in disposing of defective habeas petitions); *Hardiman*, 971 F.2d at 504 ("Rule 4 . . . indicates that Congress intended the courts to play a more active role in § 2254 cases than they generally play in many other kinds of cases.").

[131] *Hardiman*, 971 F.2d at 504. *But see infra* Part VII (arguing that Rule 4 does not contemplate raising procedural default *sua sponte*).

[132] *Hardiman*, 971 F.2d at 502-03; *see also* Yeatts v. Angelone, 166 F.3d 255, 261 (4th Cir. 1999) ("[I]n the presence of overriding interests of comity and judicial efficiency that transcend the interests of the parties, a federal habeas court may, in its discretion, deny federal habeas relief on the basis of issues that were not preserved or presented properly by a state.") (citation omitted); Schopler, *supra* note 115, § 12 ("[T]he Supreme Court has made, in view of the importance of the question involved or of public concern or in the interest of justice, an exception to its rule against consideration of questions not raised by the parties.").

[133] *Hardiman*, 971 F.2d at 503 (citation omitted). *But see infra* Parts V-VI (discussing the lack of legitimate independent federal interests that would necessitate raising procedural default *sua sponte*).

[134] *Hardiman*, 971 F.2d at 503 (citation omitted).

Although the majority of circuits, for various reasons, agree that federal courts possess discretion to raise the defense of procedural default *sua sponte*, the critical difference among the majority exists with respect to when, and under what circumstances, a court's discretion may be properly exercised.[135] According to one circuit, regardless of whether a State has waived its defense of procedural default expressly or inadvertently, the federal court may possess independent interests of its own that would permit it to invoke the defense *sua sponte*.[136] Other circuits hold that a federal court may raise procedural default *sua sponte* only if the State has waived the defense inadvertently, but not if the State has waived the defense expressly.[137] To the contrary, at least one circuit has suggested that procedural default may not be raised *sua sponte* when the State has not, in any prior proceeding, relied on that defense; the most frequent example is an *inadvertent* waiver by the State.[138]

Even though they cannot agree on the justifications for raising procedural default *sua sponte* or the circumstances under which a federal court should exercise its discretion to raise procedural default, the circuits do seem to agree on the fact that all other circuits permit *sua sponte* invocation of procedural default. According to the Ninth Circuit, "[e]very circuit to consider the issue holds that a habeas court has discretion to raise procedural default *sua sponte* to further the in-

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[135] *See* Magouirk v. Phillips, 144 F.3d 348, 358 (5th Cir. 1998) ("The First, Second, Third, Seventh, Ninth, Tenth and Eleventh Circuits have all recognized that a federal court may, in the exercise of its judicial discretion, raise procedural default *sua sponte* in a habeas case. . . . [T]he Circuits vary [however] with respect to when that discretion may be appropriately exercised.") (footnote omitted).

[136] *See Hardiman*, 971 F.2d at 503 ("Strong federal interests may exist that, balanced against those of the state in the particular case, will permit the district court in its discretion to decline a waiver [of a comity-based defense].") (quoting Thompson v. Wainwright, 714 F.2d 1495, 1509 (11th Cir. 1983)). Note, however, that the court in *Thompson v. Wainwright* held that a district court in its discretion could decline a state's waiver of *exhaustion*. *See Thompson*, 714 F.2d at 1501. In fact, the federal court does possess independent interests that can be satisfied by requiring state exhaustion. However, those same federal court interests are not satisfied by honoring a state procedural default. *See infra* Part V.

[137] *See, e.g., Magouirk*, 144 F.3d at 359 ("Where omission is the result of a purposeful or deliberate decision to forgo the defense, the district court should, in the typical case, presume that waiver to be valid.") (citation omitted); Esslinger v. Davis, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("The court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest. . . . Accordingly, when, as here, the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); Henderson v. Thieret, 859 F.2d 492, 498 (7th Cir. 1988) ("[A]lthough a district court is permitted . . . to consider a waive[d] defense belatedly raised by the state, even to raise that defense *sua sponte*, the court is not permitted to override the state's decision implicit or explicit . . . to forego that defense.").

[138] *See* Smith v. Horn, 120 F.3d 400, 409 (3d Cir. 1997) ("With regard to both nonexhaustion and procedural default . . . when the state has never raised an issue in either the district court or this Court we should be even less inclined to raise it *sua sponte* than when the state either has raised the issue . . . only belatedly or has raised it in the district court but has not pursued that line of attack in the court of appeals.").

terests of comity, federalism, and judicial efficiency."[139] According to the Fifth Circuit, "[t]he First, Second, Third, Seventh, Ninth, Tenth and Eleventh Circuits have all recognized that a federal court may, in the exercise of its judicial discretion, raise procedural default *sua sponte* in a habeas case. . . . [N]one of the federal Circuits ha[ve] taken a contrary position."[140] Likewise, the Fourth Circuit recently stated that "[t]he First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all agree that a federal court, in the exercise of its judicial discretion, may address procedural default despite the failure of the state to preserve or present the issue properly."[141]

Each new circuit to join the ranks of the majority has been emboldened by and has relied at least in part on the *perceived* unanimity of the other circuits that have ruled on the issue. As previously discussed, however, many of the circuits have adopted incompatible positions on the critical issue of *when* a federal court may properly exercise its discretion.[142] Consequently, in any given situation, it is likely that at least one circuit has held that procedural default may not be invoked *sua sponte* in that situation. Furthermore, at least one other circuit, though never cited, has also raised serious doubt concerning the propriety of raising procedural default *sua sponte*.

In *Euell v. Wyrick*,[143] the Eighth Circuit Court of Appeals reviewed the denial of David Euell's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Euell, who had been convicted in the state of Missouri for second-degree murder, raised an objection to the jury selection process at his trial for the first time after his conviction.[144] Although objections regarding jury selection must be made contemporaneously or are thereafter waived, "the state court [conducting post-conviction review] apparently considered and denied Euell's jury-selection claim despite the lack of contemporaneous objection."[145] After exhausting his available state remedies,[146] "Euell next turned to the federal courts for relief"[147] by filing a petition for a writ of habeas corpus. Despite the fact that neither the state courts below nor the counsel for the state had relied upon the petitioner's failure to properly preserve his jury-selection claim at trial,[148] "[t]he

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[139] Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998) (citing cases from the First, Second, Third, Seventh, Tenth, and Eleventh Circuits).

[140] *Magouirk*, 144 F.3d at 358 (citations omitted).

[141] Yeatts v. Angelone, 166 F.3d 255, 261-62 (4th Cir. 1999) (citations omitted).

[142] *See supra* notes 135-138 and accompanying text.

[143] 675 F.2d 1007 (8th Cir. 1982).

[144] *See id.* at 1007-08.

[145] *Id.* at 1009.

[146] *See id.* at 1008 ("No state-court remedy remains available to petitioner.").

[147] *Id.*

[148] *See id.* at 1009 ("The court's order is brief and somewhat cryptic, but one thing is clear: it does not explicitly mention any failure on the part of petitioner's trial counsel to make a contemporaneous objection. Nor, so far as the record before us indicates, did counsel for the State

District Court declined to reach the merits of the jury-selection claim, holding that . . . Euell was barred from raising the claim by his failure to move to quash the jury panel at the time of his trial."[149]

The opinion of the Eighth Circuit is not clear as to whether the State or the district court ultimately raised the defense of procedural default on habeas corpus, but the court's holding is broad enough to make clear that the federal court may not raise the defense of procedural default *sua sponte* under the facts of the case. The court held that "[t]he federal court's task is not to apply state procedural rules as though it stood in the state court's shoes, but rather to determine whether the state courts relied on adequate state grounds to dismiss the claim now being asserted in the federal court."[150] Furthermore, "[w]here a potential state procedural bar was raised neither by the parties nor by the courts in the state-court proceedings, it should not be raised for the first time to oppose a claim in federal habeas corpus."[151]

While the primary holding of the case is that a procedural default which is not relied upon in the state courts below may not subsequently be relied upon in the federal courts, a consequence of the court's broad language is that a federal court may not raise procedural default *sua sponte* where the parties have not seen fit to do so.[152] The *Euell* Court made no distinction with respect to the parties or the federal court when it commanded that a procedural default should not be raised on habeas review if not previously relied on in state court. In addition, the implication is clear that federal courts should have a preference towards conducting habeas review rather than avoiding it because "[t]he federal court's task is not to apply state procedural rules as though it stood in the state court's shoes."[153]

Admittedly, the facts of *Euell* potentially limit the scope of its holding, a factor that may bear some relation to the fact that it is ignored by the majority of circuits. However, upon closer review, *Euell* may have broader application than its facts reveal. Implicit in the *Euell* holding was the command that a federal court not raise the defense of procedural default *sua sponte* when the State, though given an opportunity to rely on the procedural default, never did so. Given

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ask that petitioner's jury-selection claim be dismissed because it had not been properly preserved at trial.") (footnote omitted).

[149] *Id.* at 1008.

[150] *Id.*

[151] *Id.* at 1009.

[152] *See* Smith v. Horn, 120 F.3d 400, 409 (3d Cir. 1997) ("With regard to both nonexhaustion and procedural default . . . when the state has never raised an issue in either the district court or this Court we should be even less inclined to raise it *sua sponte* than when the state either has raised the issue here only belatedly or has raised it in the district court but has not pursued that line of attack in the court of appeals.") (citation omitted).

[153] *Euell*, 675 F.2d at 1008.

the State's obvious incentive to enforce its own procedural rules and to dispose of matters in the most efficient manner possible, rarely will the State, when given an opportunity, fail to rely on the procedural default as a bar to consideration on the merits.

Euell demonstrates a rare exception to the general practice. In *Euell*, the petitioner presented his federal claims to the state court, though belatedly, and the State, through its courts, was directly presented with an opportunity to rely upon the petitioner's procedural default as a basis for denying relief. Instead of doing so, however, the State court ignored the procedural default and ruled on the merits of the petitioner's claims. In this sense, the facts of *Euell* are a rarity and the extent of its holding is arguably limited. However, there is at least one other significant situation that might fall under the holding of *Euell*, where the State, though given an opportunity, never relies on the procedural default.

When a state prisoner petitions for a federal writ of habeas corpus after inadvertently failing to present his federal claims in the state courts and after procedural default has occurred, the state courts below are never presented directly with an opportunity, as in *Euell*, to rely on the procedural default.[154] Instead, the only opportunity for the State to address the procedural default is to raise it as an affirmative defense in its answer to the petition for the writ of habeas corpus. Therefore, in this situation, like the one in *Euell*, the State *is* presented with an opportunity to raise and rely on the procedural default, though admittedly there is a much higher risk of failing to raise it inadvertently.

It is not an unreasonable interpretation of the *Euell* holding to suggest that the same rule against raising procedural default *sua sponte* applies whether the State fails to rely on the procedural default in the state courts below or, in the alternative, fails to rely on the default in its answer to the petition when there are no state court proceedings below. In both situations it would be equally true that "[t]he federal court's task is not to apply state procedural rules as though it stood in the state court's shoes."[155] Likewise, "[w]here a potential state procedural bar was raised neither by the parties nor by the courts

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[154] Although the state courts were never given an opportunity to pass on the federal claims in such a scenario, the relevant issue is not exhaustion since technically the state remedies have been defaulted and are no longer available. *See* Coleman v. Thompson, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.") (citations omitted); Harris v. Reed, 489 U.S. 255, 263 n.9 (1989) ("[A] federal habeas court need not require that a federal claim be presented to a state court if its is clear that the state court would hold the claim procedurally barred.") (citations omitted). Therefore, federal courts in this situation are not presented with the question of raising the exhaustion requirement *sua sponte* but are still confronted with the issue of raising procedural default *sua sponte*.

[155] *Euell*, 675 F.2d at 1008.

. . . it should not be raised for the first time to oppose a claim in federal habeas corpus."[156]

IV. THE PRESUMPTION AGAINST FINDING INDEPENDENT AND ADEQUATE STATE GROUNDS

Even when state counsel properly raises a defense of procedural default in its answer to a state prisoner's petition for a writ of habeas corpus, federal habeas corpus review is not necessarily barred. As the Supreme Court has explained, "[s]tate procedural bars are not immortal . . . they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available."[157] As such, "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent [federal courts] from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition.'"[158] Given, however, the multitude of issues that are often addressed by state courts at each successive level of a criminal prosecution, and the possible use of "unexplained order[s] . . . whose text or accompanying opinion does not disclose the reason for the judgment,"[159] it is often a difficult task for federal courts to find *actual reliance* by the state courts on any individual claim.

When a federal court conducts *direct appellate review* of a state court judgment, the "independent and adequate state ground" doctrine, whether it applies to substantive or procedural state grounds,[160] is a jurisdictional matter.[161] Therefore, the presence of an "independent and adequate state ground" is a matter of immediate consequence on direct review. Because state courts must often address overlapping

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[156] *Id.* at 1009.

[157] Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (citation omitted).

[158] *Harris*, 489 U.S. at 261 (1989) (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).

[159] *Nunnemaker*, 501 U.S. at 802.

[160] *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991) (stating that the "independent and adequate state ground" doctrine "applies whether the state law ground is substantive or procedural") (citing Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)); *Harris*, 489 U.S. at 260-61 ("Although [the 'independent and adequate state ground' doctrine] originated in the context of state-court judgments for which the alternative state and federal grounds were both 'substantive' in nature, the doctrine 'has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules.'") (quoting Meltzer, *supra* note 23, at 1134).

[161] *See Coleman*, 501 U.S. at 729 ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."); *Harris*, 489 U.S. at 260 ("This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.") (citing *Fox Film Corp.*, 296 U.S. at 210; Murdock v. City of Memphis, 87 U.S. 590 (1875)).

state and federal issues, federal courts on appeal may be uncertain whether the previous state decision rested primarily on state or federal law.[162] In order to resolve these common ambiguities, federal courts on direct review rely upon a conclusive presumption:[163] as long as the state court decision *reasonably appears to be based on federal law*, the federal court retains jurisdiction to review the federal question on direct appeal unless the state court by a *clear plain statement* indicates that its decision rests on an independent and adequate state ground.[164]

When federal courts conduct habeas corpus collateral review, the same problems of ambiguity often arise.[165] Under the rule of *Noia*, such ambiguities caused little difficulty because the "independent and adequate state ground" doctrine simply did not apply to federal habeas review.[166] Even if the state courts had rested their decisions upon an independent and adequate state ground, provided that a legitimate federal issue existed, the federal court retained jurisdiction and was expected to conduct collateral review subject only to the "deliberate bypass" rule. Once the "independent and adequate state ground" doctrine was expanded to federal habeas review on the basis of comity and concerns of federalism, the same presumption that applied on direct federal review to clear up ambiguities was also extended to habeas review.[167] If the last state court to issue a *reasoned* decision[168]

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[162] As the Supreme Court has stated:

> It is not always easy for a federal court to apply the independent and adequate state ground doctrine. State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly. In such cases, it is often difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference.

Coleman, 501 U.S. at 732; *see also Harris*, 489 U.S. at 261 ("The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion.").

[163] *See Coleman*, 501 U.S. at 732 ("In *Michigan v. Long*, we provided a partial solution to this problem in the form of a conclusive presumption.") (citation omitted).

[164] *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) ("[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

[165] *See Harris*, 489 U.S. at 262 ("The adequate and independent state ground doctrine, and the problem of ambiguity resolved by *Long*, is of concern not only in cases on direct review . . . but also in federal habeas corpus proceedings.").

[166] *See supra* note 96 and accompanying text.

[167] *See Harris*, 489 U.S. at 265 ("Having extended the adequate and independent state ground doctrine to habeas cases, we now extend to habeas review the 'plain statement' rule for determining whether a state court has relied on an adequate and independent state ground.").

[168] The Supreme Court has stated that:

> As applied to an unexplained order leaving in effect a decision . . . that expressly relies upon procedural bar, the *Harris* presumption would interpret the order as rejecting that bar and deciding the federal question on the merits. That is simply a most improbable assessment of what actually occurred.

Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

fairly appeared to base its decision on federal law or an interwoven mix of state and federal law, then a federal habeas court should presume that the "independent and adequate state ground" doctrine does not bar federal review absent a plain statement by the state court to the contrary.[169]

If the existence of this presumption against finding an "independent and adequate state ground" does not resolve the issue of raising procedural default *sua sponte*,[170] it at least suggests a proper resolution. The purpose of the presumption—to serve in ambiguous situations as a tiebreaker in favor of federal review—reveals the proper frame of mind for a federal court when determining whether or not it should review a state court conviction. If the state courts below do not make clear their reliance on procedural default the federal court should presume that procedural default is not an independent and adequate state ground barring federal review. Rather, federal courts should be of the mind that no independent and adequate state ground exists absent compelling reasons to the contrary.

Arguably, the same presumption should apply when a federal court reviews the State's answer to a petition for a writ of habeas corpus. If the State in its answer addresses the merits of a petitioner's claims, as it inevitably would in the situation where it inadvertently fails to raise the procedural default defense, the federal court should have the mind set that no independent and adequate state ground bars its review. A federal court that is directed to presume, under specified

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[169] As explained by the Supreme Court:

> After *Harris*, federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . .' In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, . . . and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

Coleman v. Thompson, 501 U.S. 722, 734-35 (1991) (citation omitted).

[170] The *Coleman* Court pronounced that:

> This [presumption] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Id. at 735 n.1. Consequently, *Coleman* recognizes that the presumption against finding an "independent and adequate state ground" does not apply to the situation where a petitioner first presents his defaulted claims directly to the federal court. Where state counsel in its answer addresses the existence of a procedural default, the federal court will not presume that the state courts below addressed the merits of the petitioner's claim and ignored the procedural default when in fact the petitioner's federal claims were never presented to the state courts below. *But see supra* Part III (discussing application of the holding in *Euell* to the situation where neither the state courts below nor the state counsel in its answer address the procedural default).

conditions, that no independent and adequate state ground exists, should not consider itself free to raise procedural default (an independent and adequate state ground) *sua sponte*.

V. RAISING THE EXHAUSTION REQUIREMENT *SUA SPONTE*

The Supreme Court has held that "[w]hen the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies."[171] Occasionally, however, the State will waive the defense of nonexhaustion either expressly or by inadvertently failing to raise it.[172] In these situations, the Supreme Court has made clear that federal courts are permitted to raise the requirement of exhaustion *sua sponte*.[173] On the basis of this rule, several circuits likewise permit federal courts to raise the defense of procedural default *sua sponte*.[174] The validity of this practice, however, is not uniformly accepted.[175]

The rule permitting federal courts to raise the requirement of exhaustion *sua sponte*, even in spite of an express waiver by the State,[176] is a rule that is supported by legitimate interests of the federal courts.[177] By requiring a petitioner to exhaust his state court remedies, the federal habeas court may avoid future involvement altogether if the state courts below grant the relief that was sought initially in the federal court.[178] Otherwise, if relief in state court is denied and the

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[171] Granberry v. Greer, 481 U.S. 129, 134 (1987) (citation omitted); *see also* Rules Governing § 2254 Cases in the United States District Courts, Rule 4, 28 U.S.C.A. foll. § 2254 (1994) ("[The answer] shall state whether the petitioner has exhausted his state remedies.").

[172] *See Granberry*, 481 U.S. at 134 ("[T]here are exceptional cases in which the State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense.").

[173] *See id.* at 136 (holding that when the state has failed to raise the nonexhaustion defense, the federal court should exercise discretion in each case to determine whether the interests of comity and justice are better served by addressing the merits immediately or by requiring complete exhaustion).

[174] *See* Magouirk v. Phillips, 144 F.3d 348, 357 (5th Cir. 1998) ("Some . . . circuits have expressly relied upon the similarity between exhaustion and procedural default to hold that a federal court may exercise its discretion to raise procedural default *sua sponte*.") (citation omitted); LIEBMAN & HERTZ, *supra* note 109, at 816 n.2 ("Relying on *Granberry* or on a like analysis, a number of decisions conclude that a federal court has the power to raise a procedural default *sua sponte* even if the state fails to assert the default in a timely fashion.") (citations omitted).

[175] *See id.* at 817 n.2 (stating that "[t]he validity of denying federal consideration and relief on the basis of forfeited claims of a procedural default is in doubt") (citation omitted).

[176] *See* 29 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 671.06[4] (3d ed. 1999) ("It [is] generally accepted that the habeas court [is] not required to accept a waiver and [can] consider the exhaustion issue even over the state's objection.").

[177] *See* Thompson v. Wainwright, 714 F.2d 1495, 1509 (11th Cir. 1983) ("Strong federal interests may exist that, balanced against those of the state in the particular case, will permit the district court in its discretion to decline a waiver and require state exhaustion.").

[178] *See id.* ("When state courts initially address requests for collateral relief some cases will never reach the federal courts, for the state courts will recognize constitutional violations and grant relief."); LIEBMAN & HERTZ, *supra* note 109, at 817 n.2 (suggesting that exhaustion in

federal court is required to conduct habeas review, the federal court may nonetheless be aided by the state court's creation of a complete factual record.[179] In addition, federal courts may possess an independent interest besides judicial efficiency in requiring state courts to become more familiar with and inevitably more hospitable toward federal claims.[180]

With respect to procedural default, however, the legitimate interests that permit a federal court to require exhaustion are lacking. A federal court that raises procedural default *sua sponte* as a bar to federal habeas corpus review does so knowing that no subsequent state court proceedings can be expected wherein the state courts might grant the requested relief, clarify the factual record or familiarize themselves with federal claims. The "delineation of situations in which federal court deferral pending state proceedings is appropriate despite the state's waiver or forfeiture of exhaustion all involve a federal court's protection of its *own* interests through remands for state exhaustion proceedings."[181] But, "[u]nlike the exhaustion doctrine, the procedural default doctrine protects *only* the interests of the States and not any interests of the federal courts."[182] Accordingly, several circuits have held that federal courts may not override a state's *decision* to waive the procedural default.[183]

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state court "may avoid the federal habeas corpus proceeding entirely by granting all the relief sought in the federal proceeding").

[179] *See* Granberry v. Greer, 481 U.S. 129, 134-35 (1987) ("If, for example, the case presents an issue on which an unresolved question of fact or of state law might have an important bearing, both comity and judicial efficiency may make it appropriate for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis."); Rose v. Lundy, 455 U.S. 509, 519 (1982) ("[F]ederal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review."); *Thompson*, 714 F.2d at 1509 ("In a particular case, fact finding on the issues with respect to which waiver is asserted may be done best in the state court. The complete factual record will aid the federal court in its review.") (citation omitted); LIEBMAN & HERTZ, *supra* note 109, at 817 n.2 (suggesting that exhaustion in state court "may streamline federal court proceedings by, for example, resolving difficult predicate issues of state law, holding evidentiary hearings and making presumptively binding factfindings, and the like") (citation omitted).

[180] *See Rose*, 455 U.S. at 519 ("As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues.") (citation omitted); *Thompson*, 714 F.2d at 1509 ("[T]he exhaustion requirement increases state courts' familiarity with and hospitality to federal constitutional claims.") (citation omitted).

[181] LIEBMAN & HERTZ, *supra* note 109, at 817 n.2 (citations omitted).

[182] *Id.*

[183] *See, e.g.*, Esslinger v. Davis, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("The court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest. . . . [W]hen . . . the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); Henderson v. Thieret, 859 F.2d 492, 498 (7th Cir. 1988) ("[A]lthough a district court is permitted . . . to consider a waive[d] defense belatedly raised by the state, even to raise that defense *sua sponte*, the court is not permitted to override the state's *decision* implicit or explicit . . . to forego that defense.") (emphasis added). *See also* Harris v. Reed, 489

But what independent federal interests might permit a federal court to raise procedural default *sua sponte* when the State does not decide to waive the defense but, rather, inadvertently fails to raise it? According to one authority, "a state's *forfeiture or waiver* of procedural default, unlike its forfeiture or waiver of exhaustion, removes *all bases* for federal court reliance on the default and accordingly should require federal habeas corpus courts to address the merits of a petitioner's claims."[184] Nevertheless, the Supreme Court and the various Courts of Appeals have suggested a few independent federal interests, the most important of which is concern for federalism. According to the Supreme Court in *Stone v. Powell*:[185]

> Resort to habeas corpus . . . results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[186]

Although the Court in *Powell* was not addressing the issue of raising procedural default *sua sponte*, it is logical to conclude that a federal court's reliance on state procedural default, despite a State's failure to raise that defense, would serve the stated interests by barring "[r]esort to habeas corpus." In dissent, however, Justice Brennan noted that "Congressional conferral of federal habeas jurisdiction for the purpose of entertaining petitions from state prisoners necessarily manifested a conclusion that such concerns could not be controlling,"[187] and he emphasized the many countervailing policies in favor of habeas corpus review.[188]

U.S. 255, 265 n.12 (1989) ("[I]f the state court under state law *chooses* not to rely on a procedural bar . . . then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim.") (citation omitted) (emphasis added).

[184] LIEBMAN & HERTZ, *supra* note 109, at 817 n.2 (emphasis added).

[185] 428 U.S. 465 (1976).

[186] *Id.* at 491 n.31 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

[187] *Id.* at 523 (Brennan, J., dissenting); *see also* Dest, *supra* note 10, at 265 ("The [state and federal] interests are in tension, but they do not actually conflict since the habeas corpus statute, by its own terms, trumps the state interests."); *id.* at 293 ("[T]he finality of state court litigation has been specifically undercut by the availability of collateral federal review under the habeas corpus statute.").

[188] Justice Brennan stated:

> There were no 'assumptions' with respect to the construction of the habeas statutes, but reasoned decisions that [the] policies [relied on by the majority] were an insufficient justification for shutting the federal habeas door to litigants with federal constitutional claims in light of such countervailing considerations as 'the necessity that federal courts get the last say with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state

Another possible federal interest in raising procedural default *sua sponte* was suggested by the Fourth Circuit in *Yeatts v. Angelone*.[189] According to the *Yeatts* court, the interest of judicial efficiency may be served if a federal court "may avoid a decision on a complex federal question . . . by denying relief on the basis of the adequate and independent state-law ground despite the failure of a state to assert a procedural bar."[190] However, it is statements like this that call into question the legitimacy of raising procedural default *sua sponte* if, in fact, it is nothing more than a docket-clearing measure. "[F]or *all courts*, excusing procedural defaults . . . is costly; it is far easier to foreclose a claim than to permit its litigation, particularly its belated litigation, and the temptation to foreclose even when there are strong contrary arguments may often be powerful."[191]

In sharp contrast to the sentiments of the Fourth Circuit is the notion that federal courts have a *duty* to exercise their congressionally created habeas corpus jurisdiction.[192] "[F]ederal court[s possess a] 'virtually unflagging obligation' to exercise civil rights jurisdiction granted by Congress."[193] Therefore, "the refusal of federal habeas corpus jurisdiction on account of a procedural default amounts to an unwarranted form of abstention."[194]

Likewise, the need for raising procedural default *sua sponte* as a docket-clearing measure is so small that adoption of such a rule on that basis simply does not justify the potential harm to a federal right-holder. According to one "study claim[ing] to be only the second multisite examination of habeas corpus ever and the first empirical research completed in more than a decade,"[195] habeas petitioners constitute only a small portion of the federal case load[196] and "most ha-

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> judges may be unsympathetic to federally created rights, [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions,' as well as the fundamental belief 'that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.

Stone, 428 U.S. at 520 (Brennan, J., dissenting) (quoting Kaufman v. United States, 394 U.S. 217, 225-26 (1969)) (citation omitted).

[189] 166 F.3d 255 (4th Cir. 1999).

[190] *Id.* at 261.

[191] Meltzer, *supra* note 23, at 1136-37.

[192] *See Powell*, 428 U.S. at 525-26 (Brennan, J., dissenting) ("Federal courts have the duty to carry out the congressionally assigned responsibility to shoulder the ultimate burden of adjudging whether detentions violate federal law.").

[193] Dest, *supra* note 10, at 266 (footnote omitted) (quoting Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 817 (1976)).

[194] *Id.* at 294.

[195] Randall Samborn, *Habeas Corpus Statistics Reveal Caseload is Light: First Major Study in a Decade Suggests Reform to Limit Petitions is Unnecessary, Fueling Debate*, NAT'L L.J., Oct. 17, 1994, at A19.

[196] *See* FLANGO, *supra* note 37, at 20 ("[H]abeas petitions are not a large proportion of federal caseload. In 1992 habeas cases represented 4.7 percent of civil cases terminated in federal courts.").

beas cases take less time than other cases."[197] While the number of state prisoners has increased, the rate of habeas filings has decreased.[198] In short, habeas corpus litigation is not running wild.[199]

In light of the habeas statistics, a rule that would not permit a federal court to raise the defense of procedural default *sua sponte* would not substantially burden the federal courts. Habeas petitions are only a small portion of the federal case load.[200] Among these petitions only a small percentage of the claims are procedurally defaulted.[201] Furthermore, for only a very small fraction of the procedurally defaulted claims will the State fail to raise its defense. Any slight reduction in the federal case load that might be realized by *sua sponte* invocation does not justify denying habeas relief or forfeiting the impartiality of the federal courts.

In stark contrast to the judicial efficiency arguments *for* raising procedural default *sua sponte* are the comments of the Supreme Court in *Jenkins v. Anderson*.[202] According to that decision the interest of judicial efficiency may actually be undermined by the belated consideration of a procedural default defense.[203] Because the state prisoner's attempt to overcome procedural default by showing "cause and prejudice" may turn on a question of state law or on additional facts that should have been clarified in the state courts below, the defense of procedural default may prove to be a hardship if raised for the first time in federal court.[204]

VI. ENFORCING THE STATE'S INTEREST IN FEDERALISM

While the previous discussion made clear that a federal court's *own* interests in raising procedural default *sua sponte* are either not legitimate or are specifically undercut by other significant federal interests,[205] another possible justification for raising procedural default *sua sponte* is found in the state interest of "federalism." The reason for characterizing federalism as a "state interest" rather than a "federal interest" is the simple fact that it is invariably invoked to prevent *federal* overreaching of *state* authority. In the context of raising pro-

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[197] *Id.* at 20-22.

[198] *See id.* at 22 ("Even though the number of state prisoners has nearly quadrupled in the past 25 years, the rate of habeas filings per prisoner has declined steadily.").

[199] *See* Samborn, *supra* note 195 ("The most important aspect of this study for me is the conclusion that habeas corpus cases are not the burden that many people perceive them to be.") (quoting Professor Ira Robbins of American University, Washington College of Law).

[200] *See* FLANGO, *supra* note 37, at 20.

[201] *See id.* at 66-67 tbl. 19.

[202] 447 U.S. 231 (1980).

[203] *See id.* at 234 n.1 ("Considerations of judicial efficiency demand that a *Sykes* [procedural default] claim be presented before a case reaches this Court.").

[204] *See id.* ("The applicability of the . . . 'cause'-and-'prejudice' test may turn on an interpretation of state law.") (citation omitted).

[205] *See supra* Part III.

cedural default *sua sponte*, the issue is whether federal courts are the proper party within our adversarial system to raise and enforce what is essentially a state interest.

From the Federalist Papers[206] to modern decisions involving the Commerce Clause,[207] a debate has raged regarding how best to enforce the doctrine of federalism.[208] On one side of the debate are those who argue that political constraints within our federalist system offer sufficient protection for states' interests.[209] On the other side are those who argue that judicial enforcement is required as well.[210] While one might concede, at least, that the practice of the Court has been to enforce the concerns of federalism, the critical question with respect to raising procedural default *sua sponte* is whether federal courts should not only enforce, but also introduce concerns of federalism. In other words, is the protection of our federalist structure so important that it *becomes* an independent interest of the federal courts?

The proper resolution of how best to enforce the interest of federalism, whether it is a state interest or a federal interest, is beyond the scope of this Note. However, perhaps a simple change in frame of reference will suggest a simple solution. While the interest of federalism is commonly relied upon as a *state defense,* implying adversarial conflict between the state and federal governments, consider for a moment that the purpose of federalism is to protect the *individual* from the government, state or federal.[211] Justice Brennan writes:

> Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal

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[206] *See* THE FEDERALIST NO. 45 (James Madison) (1788) (discussing the structural safeguards in the federalist system for maintaining the proper role of the states); THE FEDERALIST NO. 46 (James Madison) (1788) (discussing the natural advantages for the states in the federalist system).

[207] *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (holding that held that Gun-Free School Zones Act, which made it a federal crime to knowingly possess a firearm where the possessor knew or had reasonable cause to believe was a school zone, exceeded Congress' commerce clause authority, since possession of gun in a school zone was not an economic activity that substantially affected interstate commerce).

[208] *See* STONE ET AL., *supra* note 74, at 182-88 (discussing the enforcement of federalism through political constraints versus judicial enforcement).

[209] *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

[210] *See id.* at 566-67 (Powell, J., dissenting) ("The fact that Congress generally does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so.") (footnote omitted).

[211] *See* Brennan, *supra* note 22, at 442 ("We prize our federalism because of the proved contributions of our federal structure towards securing individual liberty. The distribution of the powers of government among many repositories is a sure guarantor against the tyranny and oppression which so often results from undue concentration of power.").

> system is that it provides a double source of protection for the rights or our citizens. Federalism is not served when the federal half of that protection is crippled.[212]

According to Justice Brennan, "[f]ederalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty."[213] Under Justice Brennan's concept of federalism, therefore, a federal habeas court wishing to serve that principle should strive to achieve federal review rather than avoid it. A federal court that works for Justice Brennan's brand of federalism works to maximize protections for the individual, not protections for the State.

VII. RULE 4 OF THE RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 4 permits a district court to dismiss a state prisoner's petition for a writ of habeas corpus before requiring the State to file an answer to the petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court."[214] On the basis of this rule some circuits have held that federal courts are permitted to raise the defense of procedural default *sua sponte*.[215] While it is true that Rule 4 "indicates that Congress intended the courts to play a more active role in § 2254 cases than they generally play in many other kinds of cases,"[216] the official comments to the rule reveal that dismissal of a prisoner's petition before the filing of the State's answer should be based on the merits of a claim not on procedural defenses.

Rule 4 contemplates a specific sequence of events. If the sequence is followed properly, the federal court will not consider procedural defenses until after it has decided not to order a summary dismissal. Rather, procedural defenses are considered "where either dismissal or an order to answer may be inappropriate."[217]

The first action contemplated by Rule 4 is an examination of the petition by the district court in order to "screen out frivolous applications."[218] Under Rule 4, "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not enti-

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[212] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977) (footnote omitted).

[213] *Id.* at 503.

[214] Rules Governing § 2254 Cases in United States District Courts, Rule 4, 28 U.S.C.A. foll. § 2254 (1994).

[215] *See, e.g.*, Hardiman v. Reynolds, 971 F.2d 500, 504 (10th Cir. 1992) ("The district court's ability to raise a defense . . . *sua sponte* is . . . consistent with the authority that the Rules Governing Section 2254 Cases in the United States District Courts give to the district courts.").

[216] *Id.*

[217] Rules Governing § 2254 Cases in United States District Courts, Rule 4, 28 U.S.C.A. foll. § 2254 advisory committee's note (1994) [hereinafter Rule 4 Advisory Committee's Note].

[218] *Id.*

tled to relief in the district court, the judge shall make an order for its summary dismissal."[219] Though the rule itself does not make clear what factors a court should consider in deciding to dismiss at this step in the process, the remaining sequence of events reveal that the court's review should be limited to the merits of the claims at this point. If, for example, the prisoner fails to allege any violations of a constitutional nature or states claims that are based on a clearly erroneous concept of federal law, then the district court should dismiss the petition without requiring the State to file an answer.

The next step contemplated by Rule 4 is a decision by the district court regarding whether or not to require the State to file an answer. If it plainly appears from the face of the petition that the petitioner is not entitled to relief, then the court shall order dismissal of the petition. If this is not the case, however, "the judge shall order the respondent to file an answer . . . *or take such other action as the judge deems appropriate.*"[220]

The comments to Rule 4 state:

> Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss *based upon information furnished by respondent*, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody . . . or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition.[221]

Therefore, procedural defenses such as nonexhaustion and presumably procedural default are to be used by the State to avoid the requirement of filing an answer *after* the federal court has determined that dismissal is not appropriate. The inference to be drawn from the sequence of events is that the court's initial decision to dismiss should be based on the merits rather than potential procedural defenses.

First, the federal court should decide from the face of the petition whether a summary dismissal is appropriate. If the court chooses not to dismiss, it should order the State to file an answer. In the alterna-

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[219] Rule 4 Advisory Committee's Note, *supra* note 217.
[220] *Id.* (emphasis added).
[221] *Id.*

tive, if, after choosing not to dismiss, the State furnishes information demonstrating procedural grounds for a dismissal, the court, if it deems it appropriate, "may [dismiss to] avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition."[222] Because the various procedural grounds are discussed as potential bases for avoiding the requirement of filing an answer *in the situation where summary dismissal is not appropriate* and because "the judge may . . . authorize the respondent [state] to make a motion to dismiss *based upon information furnished by [the] respondent [state]*,"[223] Rule 4 does not contemplate *sua sponte* invocation of procedural bars by the federal court. The "more active role" of the federal courts under Rule 4 involves dismissing petitions that would not succeed on the merits if the State were required to address those substantive merits in an answer; it does not involve raising procedural defenses *sua sponte* when dismissal on the merits is not warranted.

VIII. ADVERSARIAL SYSTEM

The arguments which have been discussed for and against raising procedural default *sua sponte* must be considered in the context of our adversarial system of justice. Although the specific policies that are implicated by collateral habeas corpus review may or may not suggest divergence from the general rule, nevertheless, *there is a general rule* that a court should not raise affirmative defenses for the parties.[224] As the Supreme Court has stated, "[t]he rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[225] Accordingly, at least one circuit has already advised against raising procedural default *sua sponte* when the state has never raised that issue before.[226]

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[222] *Id.*

[223] *Id.*

[224] *See* Hardiman v. Reynolds, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense *sua sponte*.").

[225] United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (citation omitted).

[226] The Third Circuit has held that:

> [W]here the state has never raised the issue [of procedural default] at all, in any court, raising the issue *sua sponte* puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates. While considerations of federalism and comity sometimes weigh in favor of raising such issues *sua sponte*, consideration of that other great pillar of our judicial system—restrain—cuts sharply in the other direction.

Smith v. Horn, 120 F.3d 400, 409 (3d Cir. 1997) (citation omitted).

In addition to the general prohibition against raising issues not already raised by the parties, our adversary system counsels the court to treat the parties equally. Consequently, if a state prisoner's procedural defaults will be enforced strictly, a State's failure to comply with federal procedures, likewise, should be strictly enforced.[227] Moreover, in the habeas context, the specific conditions of the parties may actually counsel in favor of stricter enforcement against the State.[228] Therefore, unless an exception is made on other grounds, the practice of excusing a State's failure to raise its affirmative defense of procedural default cannot be justified when the habeas petitioner's own failure to present his federal claims in state court will not likewise be excused.

IX. CONCLUSION

A rule that would permit federal courts to raise the State's defense of procedural default *sua sponte* affords inadequate respect for the "Great Writ of Liberty" and overvalues the oft-cited interests of comity and federalism. Upon first review, the Supreme Court should make clear that *sua sponte* invocation of the affirmative defense of procedural default as a means of barring federal habeas corpus review constitutes an improper form of abstention from the court's proper jurisdiction that is contrary to the very purpose of the writ of habeas corpus. Although a dramatic shift in priorities has caused the Court in recent years to increasingly restrict federal habeas corpus, at one time the Court rarely enforced state procedural defaults—a far cry from invoking them *sua sponte*. Accepting the fact that the Court may never return the writ to its former status of "greatness," a rule that would permit a federal court to raise comity based defenses in addition to the already troublesome limitations on federal review, simply tips the scale too far in favor of denying the vindication of federal rights.

JEFFREY C. METZCAR

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[227] *See* LIEBMAN & HERTZ, *supra* note 109, at 646-47 ("[I]n keeping with the equitable imperative to treat litigants on both sides of a lawsuit the same, most federal courts . . . have recognized the need to apply waiver doctrines as strictly against the States and Federal Government as against habeas corpus petitioners.") (footnotes omitted).

[228] *See id.* at 648 ("Because 'the lawyers employed by a state attorney general should be masters' of federal habeas corpus law and defenses, and because states' attorneys are better placed than federal judges to know when a State's federalism and comity interests are at stake, those attorneys at the least should be held to procedural standards that are no less exacting than those applied to *pro se* prisoners.") (footnotes omitted).